

DOMENICO A. TUSSIO ET AL.

IBLA 76-637

Decided April 29, 1977

Appeal from decision of Division of Cadastral Survey, Bureau of Land Management, dismissing appellants' protest against the acceptance of the plat of a dependent survey in T. 9 N., R. 9 W., New Mexico Principal Meridian, Group 719, New Mexico.

Hearing ordered.

1. Hearings! ! Secretary of the Interior! ! Surveys of Public Lands:  
Generally! ! Surveys of Public Lands: Authority to Make

Where the Bureau of Land Management orders a resurvey of a section to identify the boundaries of public land within the section, a private landowner may protest the resurvey and, where the protesting landowner points up a serious contradiction between the resurvey and the topographic calls accompanying the original plat, it is proper to remand the case for a fact hearing.

APPEARANCES: Stanley P. Zuris, Esq., Albuquerque, New Mexico, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Domenico A. Tussio and Malyle Tussio, his wife, appeal from a decision of the Acting Chief, Division of Cadastral Survey, for the Director, Bureau of Land Management (BLM), dated May 7, 1976, dismissing their protest of the dependent resurvey of a portion of Sec. 8, T. 9 N., R. 9 W., N.M.P.M., New Mexico.

It is acknowledged that, through a legal chain of title, Tussio acquired title to the E 1/2 Sec. 8, T. 9 N., R. 9 W., subject to the reservations (not here relevant) made in the original patent issued to Robert L. Perks on July 12, 1935, under Patent No. 1076700.

The Act of March 3, 1909, as amended, 43 U.S.C. § 772 (1970), provides that:

§ 772. Resurveys or retracements to mark boundaries of lands undisposed of.

The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

On March 23, 1972, the State Director, BLM, Santa Fe, New Mexico, authorized the resurvey in the said section 8 to identify the boundaries of public land within that section. The resurvey began on the ground on March 30, 1972, was completed April 13, and the plat representing this resurvey was accepted by the Bureau on May 10, 1972. Appellants' objections to this resurvey were dismissed by the Division of Cadastral Survey and they appeal to this Board complaining of deficiencies in the resurvey and asking for a hearing on the factual issues presented by the case. It is our opinion that such a hearing is mandated by the troublesome and contradictory evidence contained in the record before us.

In making a retracement or dependent resurvey of public lands, the corners established by the original survey should be located, if possible, by considering all the relevant evidence and not simply one or two factors. Rubicon Properties, Inc. et al., A-30748 (May 6, 1968). In our examination of the record in this case, we are particularly troubled by the contradiction between the 1972 placement of the north quarter section corner of section 8 and the field notes accompanying the prior (1881) plat which place this corner to the west of the road which traverses section 8. The probative value of these 1881 field notes is heightened by topographical evidence which suggests that it is unlikely that the road has moved since the time of the former survey, and we are of the opinion that a factual hearing will be of value in resolving this ambiguity. Appellants allege also the discovery of the physical marker of the north quarter section corner of section 8 as established by the 1881 plat at a location west of the road here at issue. This contention, if established, may have considerable bearing on the correct position of this corner, and the actual extent of the bona fide claim of appellants.

This case shall be transferred to the Hearings Division, Office of Hearings and Appeals, of this Department for assignment to an

Administrative Law Judge for a hearing to be held in accordance with the rules in 43 CFR 4.430 to 4.439. At the hearing, appellants will bear the risk of nonpersuasion that the situs of the BLM quarter corner common to secs. 5 and 8 is erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside, a hearing is ordered, and the case is referred to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge at which evidence and testimony relating to the placement of the north quarter corner of Sec. 8, T. 9 N., R. 9 W., N.M.P.M., shall be received, and thereafter the Judge will submit a recommended decision to this Board, and afford the parties an opportunity to file briefs with this Board after the rendition of his recommended decision.

Douglas E. Henriques  
Administrative Judge

We concur:

Newton Frishberg  
Chief Administrative Judge

Joseph W. Goss  
Administrative Judge

